

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CARL KIRCHER, ET AL., :

4 Petitioners :

5 v. : No. 05-409

6 PUTNAM FUNDS TRUST, ET AL. :

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8 Washington, D.C.

9 Monday, April 24, 2006

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:59 a.m.

13 APPEARANCES:

14 DAVID FREDERICK, ESQ., Washington, D.C.; on behalf of
15 the Petitioners.

16 MARK A. PERRY, ESQ., Washington, D.C.; on behalf of the
17 Respondents.

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P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument
next in Kircher v. Putnam Funds Trust.

Mr. Frederick.

ORAL ARGUMENT OF DAVID FREDERICK

ON BEHALF OF THE PETITIONERS

MR. FREDERICK: Thank you, Mr. Chief Justice,
and may it please the Court:

This case concerns the appealability of
remand orders under the Securities Litigation Uniform
Standards Act, or SLUSA.

Our position is that the general rule
prohibiting appealability applies in this case for
three reasons.

First, section 1447(d) has been consistently
construed to prohibit appeal of remand orders based on
a district court's lack of subject-matter jurisdiction.

That rule governs even if the district court
incorrectly construes a subject-matter jurisdiction
provision.

Second, SLUSA section 77p(c) concededly
defines removal jurisdiction and it does so by
incorporating the criteria for preemption. Thus, the
court's subject-matter jurisdiction is coextensive with

1 those cases that SLUSA preempts.

2 And third, Congress knows how to make remand
3 orders appealable when it wants to, but SLUSA contains
4 no provision for appellate review of remand orders.
5 Under respondent's approach, the Federal courts would
6 obtain jurisdiction in cases not subject to SLUSA
7 preemption, but there's no indication that Congress
8 intended that result.

9 JUSTICE SCALIA: Under your approach, Mr.
10 Frederick, the Federal court would decide the principal
11 substantive issue in the case, the principal legal
12 issue, nonfactual perhaps, and then decide that it has
13 no jurisdiction if it finds that it doesn't come within
14 -- within (c), sends it back to the State court. Is --
15 is the State court bound by -- by that finding by the
16 Federal court?

17 MR. FREDERICK: No, it's not.

18 JUSTICE SCALIA: Why not?

19 MR. FREDERICK: Because under this Court's
20 longstanding precedent, for there to be preclusion,
21 there must be a right of appellate review. So if you
22 agree that the general rule of 1447(d) applies and
23 there is no right to appeal the remand order, then the
24 basis on which that order is -- is founded, the
25 preemption of SLUSA is open for the State court to

1 address on remand.

2 JUSTICE KENNEDY: And for this Court, I
3 assume, at least theoretically, on petition for
4 certiorari?

5 MR. FREDERICK: That's correct, through the
6 State court system.

7 JUSTICE KENNEDY: What -- what was the basis
8 then, or was there a basis, for Judge Easterbrook's
9 comment, it's now or never?

10 MR. FREDERICK: He was wrong. He was wrong.
11 The issue of preemption under SLUSA can be raised by
12 the defendants on remand in the State courts. It can
13 be litigated. It's important to note that the removal
14 provision says, shall be removable. It's at the
15 defendants' discretion whether they want to ask the
16 Federal court to test whether SLUSA preempts the case
17 or to keep it in State court for the State court to
18 apply SLUSA and thereby hold that the class action
19 would be unsustainable.

20 JUSTICE KENNEDY: Do we have a standard --

21 JUSTICE SCALIA: Do we have any cases that --
22 that are like this one which are like this one which
23 involve not just res judicata of -- of the -- of the
24 finding by the Federal court, but the law of the case?

25 I mean this is the same case when it's remanded.

1 You've already had a court that has found a particular
2 element with respect to this case. It seems to me
3 highly unusual to have the same issue in the same case
4 then decided by a second court. Do you have any -- any
5 parallel?

6 MR. FREDERICK: There are cases in the lower
7 courts, Your Honor, in the complete preemption area
8 that have held that a removal based on the doctrine of
9 complete preemption was not sustainable because the
10 case was not completely preempted, but holding that
11 preemption, implied conflict preemption, can be applied
12 by the State courts on remand.

13 And it's important to note here that there --

14 JUSTICE SCALIA: You don't have any case of
15 ours, though.

16 MR. FREDERICK: Not that I'm aware of, but
17 what the City of Waco case says, upon which they base
18 their reliance, is that the reason why there was appeal
19 of that particular order was because it would be held
20 preclusive. Here, it would not be held preclusive
21 because there is no right of appellate review.

22 JUSTICE SOUTER: Well, is -- is there --
23 correct me if I'm wrong, but I -- I had thought there
24 was an -- an easier answer, and that is that the -- the
25 decision that ultimately the State court will make, as

1 to whether there is or is not preclusion, is not
2 identical to the decision that the Federal court --
3 that the district court makes on the motion for remand
4 because on the -- and this is the way I was going about
5 it.

6 On the motion for remand, all a Federal court
7 decides is whether, in fact, there is a colorable basis
8 for the removal. When it goes back, if it does go
9 back, to the State court, there will be an opportunity
10 not to go merely to the stage of colorable basis, but
11 to litigate it ultimately on the merits. So -- so that
12 what we have is a -- in effect, a kind of quick-look
13 finding at the Federal level, and that does not
14 preclude a -- a complete development of the issue on
15 the merits in the State court, if that's where it goes.

16 MR. FREDERICK: That is certainly true,
17 although I would take issue with the notion of there
18 being a colorable claim. I don't think that the SLUSA
19 removal is analogous to the Federal officer removal
20 statute where the statute itself says the defense has
21 to be under color of law, and this Court in the Mesa v.
22 California case said that phrase is where the colorable
23 claim creates Article III jurisdiction.

24 CHIEF JUSTICE ROBERTS: Okay, but do you take
25 the position --

1 MR. FREDERICK: But I -- I don't -- sorry.
2 If I could just finish. I don't contest the rest of
3 it, which is that on remand, preemption can be
4 developed through amended pleadings, through facts that
5 are developed --

6 JUSTICE GINSBURG: Yes, but you must take
7 issue with the this is only a quick determination,
8 unless you also agree with -- disagree with Justice --
9 Judge Easterbrook when he said, the decision for the
10 Federal court is only two things. It's either remand
11 or dismiss the action. That is, the Federal court
12 under no circumstances will keep this case for trial.
13 Either it will dismiss it outright or it will remand.

14 MR. FREDERICK: Well, under their theory,
15 though, Justice Ginsburg, the court could, because of
16 their construction of the removal jurisdiction
17 provision, would retain jurisdiction.

18 JUSTICE GINSBURG: Yes, but that was not --
19 certainly not the Seventh Circuit's understanding.

20 MR. FREDERICK: Well, and we think that that
21 position that they have advanced in this Court is
22 incorrect, and I would agree with your postulate that
23 what the Federal district court does and it has
24 jurisdiction to do is to decide whether preemption
25 applies and then remand the case, or if preemption does

1 apply, to dismiss it.

2 JUSTICE SCALIA: Whether preemption applies
3 or whether there's a colorable basis for saying? I
4 thought you were saying that the district court decides
5 whether preemption applies.

6 MR. FREDERICK: It does -- it does do that.
7 It's --

8 JUSTICE SCALIA: So you don't -- you don't
9 agree with what Justice Souter was saying, that all
10 it's -- all it's making is a colorable basis.

11 MR. FREDERICK: I thought I expressed my --

12 JUSTICE SOUTER: In other words, you take the
13 position that -- and -- and you may well be right, but
14 I mean, you take the position that there is a complete
15 determination on the merits at the -- at the stage at
16 which the district court rules on the motion to remand.

17 MR. FREDERICK: That's -- on the basis of the
18 record then before it.

19 JUSTICE SOUTER: Yes.

20 MR. FREDERICK: Yes.

21 JUSTICE SOUTER: Well, you say on the basis
22 of the record then before it. I mean, they can -- they
23 can -- can they put in any evidence they want?

24 MR. FREDERICK: The court always has the
25 authority to have evidence taken to determine its own

1 jurisdiction. That's routinely done by district
2 courts.

3 JUSTICE GINSBURG: Mr. Frederick, as I
4 understand it, at least the Seventh Circuit's fix on
5 this case was that the Federal courts have adjudicatory
6 authority to do one thing and to do that one thing
7 finally, that is, to decide whether this is a case that
8 cannot be brought in any court or whether it's a case
9 that Congress has left over for the States still to
10 deal with. That was the whole theory of the Seventh
11 Circuit, that this is no quick look. The -- the
12 Federal courts are making a final determination. And I
13 think that would exclude what Justice Souter has
14 suggested.

15 MR. FREDERICK: I -- I agree with you that
16 that is how the Seventh Circuit described the opinion
17 and what -- what the adjudicatory authority was, and
18 that is why we take issue with the Seventh Circuit. We
19 do think that the State court on remand has any issue
20 that the defendants want to raise before it. All that
21 the Federal district court has done is to decide that
22 -- that there was no basis for a SLUSA preemption
23 because the requisites of subsection (b) had been
24 satisfied.

25 But I want to point out that the issue before

1 you is whether or not that decision, correct or not, is
2 appealable. And what is important in the error of the
3 Seventh Circuit was that they held that that decision
4 was appealable, and under the Thermtron rule, as
5 applied in Gravitt and Things Remembered, even a
6 district court decision that is erroneous in its
7 construction of a subject-matter jurisdiction provision
8 is still a remand based on subject-matter jurisdiction
9 and therefore falls within the four corners --

10 JUSTICE BREYER: Well, it doesn't -- what
11 Thermtron says is that we read (d) in conjunction with
12 (c). Now, the reason that (c) is relevant here is
13 because it says, if at any time before final judgment
14 it appears that the district court lacks subject-
15 matter, the case shall be remanded.

16 Presumably what (c) is thinking of are cases
17 where subject-matter jurisdiction is not the whole
18 issue before the -- the Federal court. It's thinking
19 that subject-matter jurisdiction in certain instances,
20 like a defect in a removal proceeding, is something
21 that the -- that the Federal court could get to prior
22 to a final judgment.

23 But here, the final judgment in the Federal
24 court is the very question of whether this is preempted
25 or not. And therefore, I guess what Easterbrook is

1 thinking is that that isn't the kind of subject-matter
2 jurisdiction dismissal to which (c) refers.
3 Consequently, it is not within the scope of (d)'s no
4 appellate review rule.

5 MR. FREDERICK: And our problem with that,
6 Justice Breyer, is that all eight district court
7 decisions here thought that they were deciding subject-
8 matter jurisdiction, and they thought that because
9 Federal preemption ordinarily is not a basis for
10 removal. And --

11 JUSTICE BREYER: No. It's no doubt that all
12 the lower courts then would be wrong. But the reason
13 he says that they are wrong is because they looked at
14 the word, subject-matter jurisdiction, in (c) without
15 realizing that the reference in (c) is a reference to
16 instances where subject-matter jurisdiction is not the
17 whole issue; i.e., it's something other than the final
18 Federal court decision.

19 MR. FREDERICK: It -- it is --

20 JUSTICE BREYER: That would be the argument
21 he's making. I would like your response.

22 MR. FREDERICK: Well, functionally it is the
23 equivalent of codifying the complete preemption
24 doctrine, which is how SLUSA actually works. And in
25 the complete preemption cases, Beneficial Bank is what

1 spells out this --

2 JUSTICE BREYER: I agree with you. You would
3 also have to say that the same rule applies, one, to
4 the complete preemption cases and, two, to sovereign
5 immunity determinations under the Foreign Sovereign
6 Immunity Act. But he would say that may be so, but
7 nonetheless, Judge Easterbrook would say, well, so be
8 it. That's what Congress intended. That is wrong to
9 deprive someone of a right to appeal when it turns on a
10 misreading of (c) and an incorporation of the
11 misreading into (d).

12 MR. FREDERICK: It would be a strikingly odd
13 result, though, for this Court to reach that, given
14 that Congress has clearly provided for appellate review
15 of remand orders in other contexts, including in the
16 Class Action Fairness Act, under tribal property
17 disputes, the FDIC, the RTC, and specifically in
18 1447(d) itself, civil rights cases. So Congress knows
19 how to do this if that's what Congress had intended.

20 JUSTICE SOUTER: No, but isn't the -- isn't
21 the argument --

22 JUSTICE STEVENS: Mr. Frederick, can I ask
23 you a question?

24 JUSTICE SOUTER: -- that in those cases in
25 which Congress has provided, we -- we are not dealing

1 with a situation in which the -- the removal or not,
2 the preemption or not is the end of the litigation.
3 Here, we've got a case in which there -- there are
4 basically two kinds of preemption, as -- as you've
5 recognized. There is -- there is regular preemption,
6 on the basis of which there may or may not be a
7 removal, and there is a preclusion of any litigation
8 whatsoever.

9 And in the cases in which Congress has made
10 specific provision, were they -- the instances -- were
11 they instances in which it was the second issue which
12 precluded any litigation whatsoever? The answer may be
13 yes. I just don't know.

14 MR. FREDERICK: Well, I think that the
15 closest analogy, again, is in the complete preemption
16 area where the Court has held that, you know, the
17 removal is based on complete preemption, and if that is
18 found by the district court, that functionally
19 terminates the litigation.

20 But I would point out that even in the
21 Federal officer removal statute, there's no appellate
22 review of a district court's decision that the Federal
23 officer statute was improperly invoked to remove an
24 action. So what the securities defendants here are
25 asking for is something Congress didn't even give to

1 Federal officers.

2 JUSTICE STEVENS: Let me ask you one
3 preliminary question just to be sure I understand the
4 case. Is it your view -- when the petition for removal
5 was filed, did the district -- Federal district court
6 have jurisdiction to decide the preemption issue in
7 your view?

8 MR. FREDERICK: It had the -- it had the
9 power to determine whether SLUSA applied.

10 JUSTICE STEVENS: All right.

11 MR. FREDERICK: And that's what section
12 77p(c), when it says, as set forth in subsection (b),
13 is referring to. So the district court analyzed those
14 factors and it came --

15 JUSTICE STEVENS: So the -- there -- there
16 was jurisdiction in the Federal court to entertain the
17 removed case.

18 MR. FREDERICK: Yes.

19 JUSTICE STEVENS: Then -- then why -- then
20 how can you say the -- the remand was based on lack of
21 -- of jurisdiction?

22 MR. FREDERICK: Because the courts held that
23 the requisites of SLUSA of subsection (b) had not been
24 satisfied.

25 JUSTICE STEVENS: Well, but they -- they had

1 held it acting on an interpretation of SLUSA before our
2 decision in Dabit.

3 MR. FREDERICK: That's correct.

4 JUSTICE STEVENS: And isn't it at least
5 possible that they would -- would have decided that
6 issue had they reviewed --

7 MR. FREDERICK: It is possible, but that's
8 why the issue of the underlying district court's
9 determination is not before you. The issue before you
10 is can appellate jurisdiction be asserted to review
11 that decision.

12 But I would further point out, Justice
13 Stevens, that the Davit court assiduously avoided the
14 kinds of claims that are present in our case, which is
15 whether or not negligence can be asserted against the
16 securities defendants for failure to fair-value price.

17 Dabit was strictly a fraud case, as this Court made
18 clear. This is a negligence case, and there is a part
19 of subsection (b) which makes very clear that what
20 SLUSA is getting at are claims based on fraud.

21 But even if you were to disagree that the --
22 the district court had, you know, an alternate basis
23 that had not been properly ventilated or addressed by
24 the district court because it went off on the holder
25 theory that this Court rejected in Dabit, you still

1 wouldn't have jurisdiction to decide that because of
2 the general rule of 1447(d), which provides, as I have
3 stated, that the Court doesn't have jurisdiction to
4 review -- appellate review of a remand order.

5 CHIEF JUSTICE ROBERTS: How --

6 JUSTICE GINSBURG: Mr. Frederick, will --
7 would you please explain something to me that you just
8 said? You said that our complaint isn't about fraud.
9 It isn't about deception. It's about negligence. But
10 the Seventh Circuit reported and seemed to have no
11 doubt about it that the complaints in this set of cases
12 were based on allegations of deceit and manipulation,
13 not mismanagement.

14 MR. FREDERICK: That's incorrect, Justice
15 Ginsburg. We've put the complaints before you. They
16 are in the joint appendix. We have cited every
17 paragraph in which those claims are asserted.

18 The Seventh Circuit based its decision about
19 that on a misunderstanding of the colloquy at oral
20 argument in the Seventh Circuit, which respondents have
21 recited the Web site. You can listen to the argument
22 yourself. It did not contain any type of concession by
23 counsel for the class that these claims were anything
24 other than the negligence claims, which on the four
25 corners of the complaint, they assert themselves to be.

1 JUSTICE GINSBURG: The -- the Seventh Circuit
2 said precisely, in particular, they did not argue in
3 their briefs and did not maintain at oral argument,
4 despite the court's invitation that their suits allege
5 mismanagement rather than deceit or manipulation. So
6 is that totally wrong, that you did do it -- mention it
7 in your briefs?

8 MR. FREDERICK: The briefs recounted what the
9 claims are, which are negligence claims.

10 JUSTICE GINSBURG: Then how could the Seventh
11 Circuit have gotten it that wrong?

12 MR. FREDERICK: Well, the Seventh Circuit
13 made five crucial errors, that it was wrong to describe
14 the district court as saying that removal was proper.
15 The district court didn't say that.

16 They were wrong to say that the remand was
17 based on section 77(d)(4). That's not what the
18 district court did.

19 They were wrong to evaluate section 77p(c)
20 without even reciting or construing the language.

21 They were wrong to say that SLUSA's
22 substantive decisions, quote, must be made by the
23 Federal rather than the State judiciary. That's not
24 correct.

25 And they were wrong to say that it was now or

1 never for appellate review whether an action under
2 State law is preempted.

3 CHIEF JUSTICE ROBERTS: But it -- it might
4 have been that prior to Dabit, you would have been
5 emphasizing -- or whoever would have been emphasizing
6 the -- the fraud character of -- of the claims, and
7 after Dabit, perhaps the negligence boat is the only
8 one left for you.

9 MR. FREDERICK: But the point, Mr. Chief
10 Justice, is that this is on a basis of subject-matter
11 jurisdiction. It's not waivable and we're permitted to
12 say that a district court decision based on subject-
13 matter jurisdiction can look at the relevant claims.
14 It is true that the perception at the time was that
15 these holder theories evaded SLUSA. All of the courts
16 up until that time of Kircher II had held that, and
17 that's not an unreasonable position for a lawyer to
18 take.

19 Now, certainly after Dabit, those claims are
20 foreclosed where there are holder fraud claims. We do
21 -- we obviously don't take issue with that.

22 But here, the claims in the complaint
23 themselves are based on negligence, and it is certainly
24 fair --

25 CHIEF JUSTICE ROBERTS: Maybe this is not a

1 fair -- how likely is it, given our determination in
2 Dabit about how Congress intended to treat fraud
3 claims, that negligence claims are going to fare any
4 better?

5 MR. FREDERICK: Well, this Court in the Santa
6 Fe case, Mr. Chief Justice, said that negligence claims
7 are not within 10b-5. Those are claims that are
8 properly brought under State law.

9 JUSTICE BREYER: Would it make sense --

10 MR. FREDERICK: So if the -- if the State
11 court applies Dabit and Santa Fe, it will come to the
12 conclusion that the holder theory is preempted under
13 Dabit, but the negligence theory is not preempted under
14 the Santa Fe case.

15 JUSTICE BREYER: Does it make -- what's
16 worrying me in the back of my mind is we have decided
17 Dabit since this case was brought. Then I thought,
18 well, could we remand this case in light of Dabit.
19 Now, if we did that, we wouldn't decide the issue that
20 you all want decided, and we'd let this, unfortunately,
21 slightly confused situation continue to exist.

22 What would be the consequence of that? Are
23 there -- are there a lot of cases, or is this something
24 that comes up often?

25 MR. FREDERICK: It does come up often because

1 the securities bar, every time they get a district
2 court decision that they don't like, they want to
3 appeal it, notwithstanding the general bar of
4 appealability. So this issue is something that is very
5 important to both sides in the development of this law.

6 But I would further point out, Justice
7 Breyer, that as this case has come up, your -- your
8 view would have to be based on do you have appellate
9 jurisdiction, and our submission is that you don't,
10 subject for purposes of remanding the case in light of
11 Dabit.

12 JUSTICE BREYER: I'm trying to think. It
13 seems if you -- it ought to work out similarly to what
14 happens in a case where there's a Federal issue that
15 you remove under. Now you've removed. And there also
16 is a State issue pendent. Now, what the judge does is
17 he says, defendant, you win on the Federal issue, and
18 I'm going to send this thing back now, remand it,
19 because I don't think I want to maintain here the State
20 issue. And so it's a remand order. The case is
21 remanded.

22 Now, I think you get an appeal on your
23 Federal issue there. And then -- then why shouldn't --
24 if that's so, shouldn't this work out the same way?

25 MR. FREDERICK: Well, in the Cohill case,

1 this Court addressed the situation where there was a
2 Federal dismissal of the claims and the -- and the
3 Federal district court remanded the State claims for
4 consideration under -- under State jurisdiction. And
5 the Court had internal discussion about whether or not,
6 you know, there was appealability of what was left in
7 the case.

8 Our -- our position is that ordinarily a
9 dismissal of a Federal claim is an appealable matter
10 and that that is subject to appeal, but that a remand
11 decision, which is what the district court made in this
12 case, is not.

13 JUSTICE BREYER: Shouldn't --

14 MR. FREDERICK: No, it shouldn't and the
15 reason it shouldn't is because Congress has decided
16 that it shouldn't. Congress has decided that there is
17 a paramount interest in having decisions made on their
18 merits, which is why there is not appellate review of
19 remand orders. That's --

20 JUSTICE ALITO: But aren't you -- aren't you
21 urging a very strange result that the -- the decision
22 on the merits of the SLUSA preclusion issue should be
23 decided by the State courts when the whole purpose of
24 -- of that provision was to take matters out of the
25 State courts because there was a view in Congress that

1 they were not being handled properly there?

2 MR. FREDERICK: No, Justice Alito, to the
3 contrary. They are being decided by Federal district
4 courts. They're just no subject to appellate review,
5 and it was because --

6 JUSTICE ALITO: I thought you said the merits
7 of the issue was not going to be decided by the Federal
8 court.

9 MR. FREDERICK: No. Well, the -- the merits
10 of the case are going to be decided by the State court.
11 The question of whether there's a Federal defense
12 based on SLUSA in the first instance is decided by the
13 district court in remanding the case, and then if there
14 becomes a basis through evidence or amendment to the
15 pleadings or whatnot, if the defendants want to re-
16 raise their SLUSA preemption argument, they are
17 certainly free to do that.

18 JUSTICE SCALIA: So he's right that it's
19 ultimately not decided by the Federal court.

20 MR. FREDERICK: No, it is deciding.

21 JUSTICE SCALIA: You're saying the Federal
22 court makes a decision which is not binding in the
23 case. That decision can be undone by the State court.

24 MR. FREDERICK: It is decided by the Federal
25 court within the confines of what Congress has

1 determined based on its wording of SLUSA and its fact
2 that, as this Court has said in Things Remembered, the
3 Congress is presumed to accept the general rule of
4 nonappealability unless it says so.

5 JUSTICE SCALIA: Yes, I understand that.

6 Can you answer my question? You -- you were
7 saying that the -- that the decision by the Federal
8 court on this issue is not final.

9 MR. FREDERICK: I'm saying that it is final
10 for purposes of remand.

11 JUSTICE SCALIA: Okay, but it is not final --

12 MR. FREDERICK: And that in terms --

13 JUSTICE SCALIA: -- for purposes of the
14 lawsuit.

15 MR. FREDERICK: Because -- because what SLUSA
16 does is it has an interplay between the removal
17 jurisdiction provision and it says, as set forth in
18 subsection (b).

19 JUSTICE SCALIA: I understand that, but as
20 long as you say that, the point that -- that Justice
21 Alito makes is -- is well taken, that we -- we thought
22 that this was a -- a statute designed to have the
23 Federal courts determine this issue, and it turns out
24 that the Federal court just takes the first swing at
25 it, and if a State court disagrees, it's -- it's free

1 to do so.

2 MR. FREDERICK: That is a policy choice that
3 Congress made when not providing a special mechanism
4 for appellate review of remand orders.

5 JUSTICE GINSBURG: Of course, if the Federal
6 district court says there is preclusion, therefore,
7 case dismissed, that would be reviewable.

8 MR. FREDERICK: That's correct, and that's
9 where the uniformity of decisions would come from, the
10 reviews by plaintiffs who's had their -- who have had
11 their cases dismissed. Those are subject to appeal.

12 I'd like to reserve the balance of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Frederick.

15 Mr. Perry.

16 ORAL ARGUMENT OF MARK A. PERRY

17 ON BEHALF OF THE RESPONDENTS

18 MR. PERRY: Thank you, Mr. Chief Justice, and
19 may it please the Court:

20 It was quite a litany of errors that Judge
21 Easterbrook is alleged to have committed in this case.

22 I would submit, Your Honors, he committed none.

23 Judge Easterbrook correctly recognized that
24 the only issue put into play by these petitioners was
25 the Dabit question. In their motion to remand this

1 docket, docket number 20 in the Kircher case, they
2 said, it is the fourth requirement, the in-connection-
3 with requirement, which is at issue in the present
4 case.

5 We pointed out in every subsequent brief that
6 they had waived all other issues, and they never
7 responded to that waiver. It is that, Justice
8 Ginsburg, to which Judge Easterbrook was responding
9 when he said plaintiffs never argued in their briefs
10 and they did not maintain an argument that any other
11 requirement --

12 JUSTICE STEVENS: Could we just -- can I ask
13 you suppose they didn't waive it? Would their -- would
14 their position have any merit?

15 MR. PERRY: No, Your Honor. Their complaint
16 rests on two factors that are clearly within SLUSA.
17 First, misrepresentations. They claim that our
18 prospectuses misled them into investing in these mutual
19 funds and then --

20 JUSTICE STEVENS: Let me put the question
21 just a little differently. Suppose the -- in Dabit, we
22 decided that the distinction between the purchaser-
23 seller rule and the scope of 10b-5 did not prevent
24 SLUSA from preempting. But does SLUSA preempt a claim
25 that is beyond the scope of rule 10b-5?

1 MR. PERRY: Your Honor, SLUSA precludes
2 precisely what subsection (b) says it precludes, which
3 is beyond the scope of 10b-5. For example, 10b-5
4 requires scienter. SLUSA has no scienter requirement.
5 So a non-scienter-based State law claim is still
6 precluded under SLUSA.

7 What SLUSA requires is a misrepresentation,
8 omission, manipulation, or deceptive device in
9 connection with purchase or sale of securities.
10 Period. All of that is present in this complaint.
11 They allege omissions.

12 JUSTICE GINSBURG: But they can always amend
13 the complaint and pare it down and say now -- we -- we
14 complained all along about negligence. Now, Judge, we
15 are complaining about mismanagement on the defendants'
16 part, nothing more. No manipulation. Cut out -- they
17 could have such a complaint, and would that be
18 precluded if -- if they started afresh in the State
19 court and they said, we are complaining about
20 mismanagement? We're not charging anyone with fraud or
21 deception. Couldn't -- isn't that a viable claim?

22 MR. PERRY: Your Honor, in this case they
23 could not amend their complaint because the Federal
24 jurisdiction is determined on the complaint that we
25 removed. And at the time of removal, it was clearly

1 precluded by SLUSA. And the Court's cases are very
2 clear that a plaintiff may not amend. For example, you
3 can't lower the amount in controversy below \$75,000 to
4 get back to State court. At the time of removal, the
5 Federal court both had jurisdiction over this case and
6 it was clearly precluded under SLUSA.

7 CHIEF JUSTICE ROBERTS: And -- and I
8 understand your submission -- and perhaps it's distinct
9 from the Seventh Circuit holding in this respect -- to
10 suggest that those are different standards, the
11 standard for removal and the standard for preclusion.

12 MR. PERRY: Your Honor, I think we're the
13 same as the Seventh Circuit. We may have articulated
14 it slightly different, but yes, they are different
15 standards.

16 CHIEF JUSTICE ROBERTS: So that under your
17 view at least, it's possible that you could have
18 removal jurisdiction and then determine that the -- the
19 case is not, in fact, preempted.

20 MR. PERRY: Yes, Your Honor.

21 CHIEF JUSTICE ROBERTS: And so that an
22 entirely State law case would proceed in Federal court.

23 MR. PERRY: Mr. Chief Justice, let me give
24 you an example. The answer is yes.

25 In a case in which there is removal

1 jurisdiction because the defense is colorable, there
2 may be a factual issue as to whether the in-connection-
3 with requirement is met. In 10b-5 cases, it's not
4 uncommon that that is a factual question, not a legal
5 question. The Federal court would then retain
6 jurisdiction to decide that question on summary
7 judgment, at trial, or whatever. It won't know until
8 it finally disposes of the --

9 CHIEF JUSTICE ROBERTS: Is there another
10 instance in which we've upheld Federal court
11 jurisdiction over a purely State law cause of action,
12 apart from the Federal officer situation?

13 MR. PERRY: You have the Federal officer
14 situation and you have the FSIA, Foreign Sovereign
15 Immunities Act situation, Your Honor.

16 CHIEF JUSTICE ROBERTS: But those are the
17 only two.

18 MR. PERRY: Correct, Your Honor.

19 CHIEF JUSTICE ROBERTS: So this would be a
20 pretty unusual creature that you're asking us to
21 sanction.

22 MR. PERRY: No, Your Honor. It would be
23 precisely the same creature that happens every time
24 Congress makes a case removable on the basis of a
25 Federal defense. Every time Congress does that, which

1 is not very often, the Court has held that the
2 colorable defense is sufficient to invest the Federal
3 court with jurisdiction.

4 JUSTICE GINSBURG: But then, Mr. Perry,
5 there's a whole case. See, what's peculiar about this
6 is Congress says it's not really preemption. I think
7 Justice Stevens pointed that out in Dabit. It is
8 preclusion. It says this action shall not exist.
9 Period. Not as a State claim, not as a Federal claim.

10 And it wanted the Federal courts to monitor that
11 determination. It surely didn't want -- if -- if the
12 State claim is outside that preclusion, didn't want the
13 Federal courts to sit and have a whole trial on what is
14 a non-diverse, no Federal question case. I mean, it
15 just seems -- if you're going to imagine what Congress
16 wouldn't want in the Federal courts, that would be it.

17 MR. PERRY: Justice Ginsburg, three answers.

18 First, Congress wanted Federal courts to make
19 the decision, not monitor the decision.

20 Second, we agree the Federal court has the
21 power to remand the case. If all that's left is State
22 law claims, the court doesn't have to keep it.

23 And third, that is what -- the regime that
24 Congress set up was designed because there is a risk of
25 error. Some district courts will get some SLUSA

1 preclusion questions wrong. And the question before
2 this Court really is would Congress have wanted those
3 cases to stay in the Federal courts subject to Federal
4 appellate review or --

5 JUSTICE GINSBURG: But now there you must
6 admit that you are departing from Judge Easterbrook
7 because Judge Easterbrook said this statute gives the
8 Federal court adjudicatory authority to do one thing,
9 to decide whether there's preemption or preclusion or,
10 if not, then to remand. So they make -- they make one
11 determination and bow out he said. And you're telling
12 us, no, they don't bow out. They can, if they want to,
13 keep the State law claim and adjudicate it on the
14 merits.

15 MR. PERRY: Your Honor, Judge Easterbrook
16 read section -- subsection (d)(4) to require remand.
17 Petitioners and respondents are in agreement in this
18 Court for the first time that (d)(4) does not apply to
19 the remand in this case. It only applies to remands
20 for expressly exempted actions. The -- (d)(4), it
21 says, shall be remanded.

22 The corollary to that, we would submit, is
23 that where Congress recognizes that certain cases shall
24 be remanded, even though they're within the removal
25 jurisdiction, other cases, such as this one, may be

1 remanded. Otherwise, Congress could have said all
2 cases that are not precluded shall be remanded.

3 And -- and, Justice Ginsburg, it's not as
4 counterintuitive as -- as I think petitioners are
5 trying to make it seem because there may be Federal
6 issues that continue past the preclusion --

7 JUSTICE GINSBURG: Yes. I'm simply asking
8 about the Seventh Circuit's understanding of the case.
9 It says, after making the decision that 77p(b)
10 requires, the district court has nothing else to do.
11 Dismissal and remand are the only options. So Judge
12 Easterbrook or the Seventh Circuit clearly did not
13 think that there was any adjudication on the merits of
14 a State law claim to be made. He said it twice. One
15 is at 14a of the joint appendix, and the other is 11a.

16 MR. PERRY: And, Justice Ginsburg, the reason
17 he said that was because of -- of section -- subsection
18 (d) (4), which is quoted in full at the top of page 12a
19 of the petition appendix. That is because the Second
20 Circuit had held that (d) (4) applies to remands in this
21 situation, and both petitioners and respondents in
22 their Seventh Circuit briefing took that position.
23 When we got to this Court and we both looked harder at
24 the statutory scheme, we both realized that we were
25 wrong. Therefore, Judge Easterbrook -- you know, the

1 one mistake he made was the one we led him into making.

2 But that doesn't change the validity of his
3 jurisdictional analysis, which is to say that the only
4 requirement of SLUSA that goes to the jurisdiction on
5 removal is whether this is a covered class action. The
6 elements of the preclusion defense are then the
7 substantive question of Federal law that Congress
8 authorized the Federal court to make, and it authorized
9 the Federal court to make final.

10 JUSTICE BREYER: I'm confused now. You're
11 saying both sides agreed that section 1447(d) does not
12 apply?

13 MR. PERRY: No, Justice Breyer. Both sides
14 agree that SLUSA, section 77p(d)(4) --

15 JUSTICE BREYER: All right. Now, then --
16 then I understand that.

17 What I don't understand is the question about
18 something remaining to be done. What -- what 77p(b)
19 says is the covered class action, I take it, is any
20 private party alleging. And when I see the word
21 alleging, I think you're supposed to look at the
22 complaint to see what they allege, not some other thing
23 about what's going to happen later. But you're telling
24 me that's wrong.

25 MR. PERRY: Your Honor --

1 JUSTICE BREYER: And if you're right that
2 that's wrong, I don't see how you could possibly get
3 out of (c) in 1447(c) which talks about a decision
4 before final judgment, that it lacks subject-matter
5 jurisdiction. Because if you're right, then this is
6 before final judgment, it lacks subject-matter
7 jurisdiction. That's the end of your case.

8 MR. PERRY: Justice Breyer, I disagree
9 respectfully.

10 JUSTICE BREYER: All right. You have to
11 disagree with -- I guess -- go ahead. Disagree. I'd
12 like to hear the answer.

13 (Laughter.)

14 MR. PERRY: If it is a covered class action,
15 that is, 50 plaintiffs and so forth --

16 JUSTICE BREYER: Yes.

17 MR. PERRY: -- it is removable and within the
18 subject-matter jurisdiction of the Federal courts so
19 long as the defendant has presented, either on the
20 complaint or in the removal papers, a colorable defense
21 of preclusion. Only --

22 JUSTICE BREYER: Yes, which would have to be
23 a colorable defense that there is an allegation by the
24 plaintiff that falls within (b).

25 MR. PERRY: An allegation by the plaintiff as

1 elaborated on by the removal notice, if necessary,
2 because where Congress has waived the well-pleaded
3 complaint rule, the removal court will look beyond the
4 four corners of the complaint to include affidavits and
5 other materials provided by the defendant. That has
6 always been held the case in -- in the rare instances
7 where Congress has made a Federal defense removable.
8 The Court said that in the Franchise Tax Board case,
9 for example, and it's well supported by history from
10 the 1870's --

11 JUSTICE GINSBURG: But I don't think that any
12 of those cases are comparable, in that the removed case
13 is going to be tried someplace.

14 Take a diversity case. The Federal court has
15 to decide -- and it's removed -- whether the parties
16 are really diverse. If it decides that they are really
17 diverse, it keeps the case and it's adjudicated in
18 Federal court. If it decides they're not, the case is
19 adjudicated in the State court.

20 But here, the determination is, is there a
21 claim to be tried anyplace? And if there is preclusion
22 under SLUSA, then it's not a question of, as Judge
23 Easterbrook put a menu, where is -- it's not a where
24 question. It's a whether question. And so that makes
25 -- makes SLUSA quite different from other cases where

1 the -- the case is going to be tried someplace. Here,
2 the decision to be made is, is this going to be tried
3 or not? Is it -- is it a claim or is not a claim?

4 MR. PERRY: I entirely agree with you, Judge
5 -- Justice Ginsburg, and I think that supports Judge
6 Easterbrook's opinion.

7 In the where will it be tried case, the lack
8 of appellate review is less important because the
9 merits of the case will go to State court and up
10 through the system, and any Federal issues can reach
11 this case.

12 In the SLUSA case, where the district court
13 erroneously, as we know the district court erroneously
14 did here, denies the preclusion and sends the case back
15 to State court, that is a final determination of
16 Federal law that we submit is not reviewable in State
17 court and can't be reviewed by this Court up on review
18 through the State system. So that --

19 JUSTICE SOUTER: Why do you say it is not --
20 why do you say that it cannot be examined in State
21 court if there's no appeal in the Federal forum?

22 MR. PERRY: Your Honor, this Court has always
23 held and reiterated in the Munsingwear case that where
24 a collateral estoppel attaches because an issue has
25 been fully and finally litigated in a court of

1 competent jurisdiction between the same parties, that
2 the availability of an appeal --

3 JUSTICE SOUTER: Well, but the --

4 MR. PERRY: -- does affect collateral
5 estoppel.

6 JUSTICE GINSBURG: Yes, but -- but there is
7 also exceptions to the rule of claim and issue
8 preclusion, and when you don't have an opportunity to
9 appeal because the system doesn't let you appeal, then
10 you can say, Judge, don't give this preclusive effect.

11 I did not have that full and fair opportunity because
12 I was unable to appeal. And I think that that's solid
13 preclusion law.

14 MR. PERRY: Justice Ginsburg, this Court has
15 never held that an appeal is required to give
16 collateral estoppel effect. Therefore, on remand, the
17 court could -- the Madison County State court could
18 give collateral estoppel effect. In fact, I expect
19 petitioners would argue precisely that. And no
20 decision of this Court stands as a barrier to that.
21 The Court would have to change preclusion law to say
22 that the lack of an appeal is a prerequisite to appeal.

23 I agree with you, Your Honor, that it can be taken
24 into account by a court, but it does not --

25 JUSTICE GINSBURG: And a Nassau County court

1 could say, we're not going to treat that as preclusive.
2 They didn't have a fair chance to appeal. And that
3 would be all right.

4 MR. PERRY: And if they came out the other
5 way and said, I am going to treat it as preclusive,
6 because the Supreme Court says you don't have to have a
7 right to appeal, we'd be stuck with that.

8 JUSTICE SOUTER: Well, you wouldn't be stuck
9 with it. I mean, that would be a Federal preclusion
10 decision and that would ultimately be reviewable here.

11 MR. PERRY: That -- that decision would be
12 reviewable here, Your Honor. It's an unnecessary
13 multiple layers of appeals and going through the State
14 system to decide a Federal question that Congress
15 wanted to have decided in the Federal courts.

16 JUSTICE GINSBURG: But in any case, you said
17 Easterbrook made only one mistake.

18 MR. PERRY: Only one mistake.

19 JUSTICE GINSBURG: But he made another one
20 when he said, it's now or never for appellate review.
21 That preclusion question could come to this Court if it
22 went -- the case went back and the Nassau County said,
23 well, I'm going to follow the Federal court, I'm not
24 going to -- at the end of the road, the preclusion
25 question would be open for this Court to review.

1 MR. PERRY: I respectfully disagree with you,
2 Justice Ginsburg. The -- if the State court gave
3 preclusive effect to the Federal court judgment, the
4 preclusion question would be open to question -- the
5 collateral estoppel question would be open to review.
6 But the substance of the remand order would not be. It
7 would still be barred by 1447(d), if petitioners are
8 right, and this Court held exactly that in the Missouri
9 Pacific Railroad case in 1896 and has never revisited
10 that. So that we cannot get the SLUSA issue back to
11 the State system.

12 Judge Easterbrook was exactly right. It is
13 now or never, Your Honor. And Congress certainly could
14 not have expected on an issue of this magnitude where
15 it passed a law 3 years after the PSLRA --

16 JUSTICE GINSBURG: It's now or never. The
17 question is not can you -- is there an appeal or does
18 1447(d) bar it. The question is whether an action
19 under State law is preempted.

20 And suppose this case had gone along in the
21 Federal -- in the State court, and the defense of
22 preclusion is made in the State court. The State court
23 could certainly decide that question. Nobody removed
24 it. So the State court has competence to decide that
25 question, doesn't it?

1 MR. PERRY: Certainly, Your Honor.

2 JUSTICE GINSBURG: And in -- this Court could
3 decide it on review.

4 MR. PERRY: In a non-removed case, yes.
5 Petitioners' theory, though, is if this is a 1447(d)
6 bar, and it was removed to Federal court, decided that
7 it was not precluded by SLUSA and remanded it, this
8 Court could not review it directly or indirectly, could
9 not review the issue of SLUSA preclusion decided by the
10 Federal court.

11 JUSTICE SOUTER: I -- I don't understand
12 that. Why can't it?

13 JUSTICE KENNEDY: And your best case on that
14 is Munsingwear?

15 MR. PERRY: No, Your Honor. Our case on
16 that, where the Court held exactly that, is Missouri
17 Pacific Railroad v. Fitzgerald.

18 JUSTICE KENNEDY: Oh, the Missouri Pacific
19 case.

20 JUSTICE GINSBURG: Was that a case where
21 there was no possibility of reviewing the decision of
22 the court of first instance?

23 MR. PERRY: Yes, Your Honor. It was a case
24 --

25 JUSTICE KENNEDY: On -- on the merits of the

1 issue as opposed to diversity?

2 MR. PERRY: On the merits of the final
3 judgment in the case, correct, Your Honor.

4 JUSTICE GINSBURG: And why --

5 JUSTICE BREYER: In other words, if -- I
6 mean, it's awfully surprising -- I think that's why
7 you're getting this resistance -- that there's an issue
8 in a case, does -- is the -- the State action preempted
9 or not. They've never had an appeal. So they get it
10 tried. The whole case is tried out, and then the --
11 some State court says, in our opinion it is preempted.

12 But they can't decide that. They can't decide it
13 because there was a Federal judge who said the opposite
14 in the same case before the case was final.

15 MR. PERRY: Justice Breyer, I think the State
16 court could decide that. It's not --

17 JUSTICE BREYER: And they don't -- and if
18 they refuse to decide it, why wouldn't this Court say,
19 this is the same case? There is only one case. It
20 isn't over yet, and we're reviewing that, and we think
21 that district judge was wrong. We think that Federal
22 district judge never read Dabit, which isn't surprising
23 since it was decided after he wrote the opinion.

24 (Laughter.)

25 MR. PERRY: Justice Breyer, we would

1 certainly hope that if petitioners were to prevail on
2 the 1447(d) issue, this Court would make clear both
3 that we could relegate the question to State court and
4 bring it to this Court.

5 What we are saying is under the current state
6 of this Court's law, laid out in our brief and not
7 challenged in any regard by petitioners, that is not
8 obviously the case, so that we are left with the fact
9 that a State court could give preclusive effect to an
10 obviously wrong Federal judgment that could not be
11 reviewed in this Court.

12 JUSTICE SOUTER: So you're saying we would
13 have to overrule Missouri Pacific?

14 MR. PERRY: I think you would have to clarify
15 at least that Missouri Pacific does not apply to SLUSA
16 removals and remands, Justice Souter.

17 JUSTICE KENNEDY: Is part of the dynamic
18 here, Mr. Perry, that if this goes back to the State
19 court, that affects the dynamics of the litigation
20 because you now have a class action that has to
21 proceed, and that a large part of the litigation
22 strategy in these cases is determined by whether or not
23 there's going to be a full trial on the merits of the
24 class action to effect a settlement, and so forth, so
25 that Congress wanted to have this reviewed quickly and

1 in the Federal courts?

2 MR. PERRY: Correct, Your Honor. And --

3 JUSTICE STEVENS: May I ask this question?

4 Because I hadn't, frankly, realized the importance you
5 attach to the Missouri Pacific case. And the way you
6 describe it as saying that the -- the State court
7 cannot be held to have decided against a Federal right
8 -- well, anyway, the -- the point is there are two
9 things that are decided by the Federal court when it
10 remands a case. One, there was no preemption, and two,
11 therefore, there shall be a removal.

12 Now, as I understood the principle underlying
13 that case, the -- the correctness of the remand could
14 not be reviewed. That's litigated. But could not the
15 correctness of the reason given for the remand, namely
16 there was no preemption, be removed by us on
17 certiorari?

18 MR. PERRY: Not under petitioners' theory,
19 Your Honor, because their theory is that the inquiries
20 are completely and totally coextensive. The
21 jurisdictional inquiry, the -- the remand inquiry is
22 precisely the same as the preclusion inquiry. Our
23 position is that --

24 JUSTICE STEVENS: Under their theory, but it
25 seems to me very strange to say that we could not, when

1 we do get the case on a petition for certiorari --
2 couldn't review whether it was -- whether it was in
3 fact preemption.

4 MR. PERRY: Your Honor, I'd submit that it's
5 very strange that this would not be just reviewable
6 straight up through the Federal system, as Judge
7 Easterbrook and the Seventh Circuit correctly held.

8 CHIEF JUSTICE ROBERTS: But the reason is
9 there are two separate questions. They just happen to
10 be identical. But I mean, the State court isn't going
11 to worry about whether removal is appropriate or not.
12 It doesn't have to answer that question, but it may
13 well have to answer the question whether it's
14 preempted. It happens to be the same analysis, at
15 least under a reading of the statute, but that doesn't
16 meant that you -- that just because a review of the
17 removal decision -- the remand decision is -- is
18 precluded, that review of the preemption decision is
19 precluded.

20 MR. PERRY: Your Honor, that -- that may well
21 be a fair distinction of the Missouri Pacific case. We
22 come to the Court today with the law as it stands and
23 not knowing whether such a distinction will be drawn in
24 the future --

25 JUSTICE BREYER: But it's so odd.

1 MR. PERRY: -- the Seventh Circuit.

2 JUSTICE BREYER: Suppose -- suppose the -- it
3 came up under the Foreign Sovereign Immunities Act.
4 The district court judge remands the case. In his
5 opinion Romania is not a country. That's what he
6 thinks. Never heard of it.

7 (Laughter.)

8 JUSTICE BREYER: So -- so it goes back to the
9 State court and the State court says, yes, that's
10 right. We've not heard of Romania either. It's not a
11 country.

12 All right. Now, you're saying there we are
13 for all time. Everybody is stuck with this holding.

14 MR. PERRY: Your Honor --

15 JUSTICE BREYER: Is that right? Maybe that's
16 why I'm so surprised that such could be the law.

17 MR. PERRY: If -- if it works the same way
18 with SLUSA, such could be the law. The Court certainly
19 has the opportunity to clarify that.

20 Again, I'll return to the simpler way --

21 JUSTICE GINSBURG: You're -- you're positing
22 a -- a State court that's going to, by golly, give that
23 Federal decision preclusive effect even though, say,
24 the Restatement of Judgments says -- now if a decision
25 didn't -- if there was no opportunity for review, then

1 that's a ground for refusing preclusive effect.

2 MR. PERRY: And in -- and in Munsingwear,
3 Your Honor, the United States cited that precise
4 provision of the Restatement of Judgments to this
5 Court, and six Justices of this Court held, no, if
6 there's no appeal, we are still going to give this
7 judgment collateral estoppel effect. Certainly a State
8 court would not be unreasonable in following this
9 Court's lead, since this Court has never retreated from
10 that statement.

11 JUSTICE GINSBURG: I thought Munsingwear was
12 about mootness.

13 MR. PERRY: Your Honor, it was about mootness
14 and the result of the -- the Government's complaint
15 there was that it was going to have to live with the
16 collateral estoppel effects of the judgment. One of
17 the arguments they made was, well, because we can't get
18 an appeal, we won't be bound, and the Court disagreed
19 with that en route to saying, and to avoid that
20 problem, precisely that problem, you should have asked
21 for vacatur. But since the Solicitor General didn't do
22 it, the Court -- the decision stood and it had
23 collateral estoppel effect. That -- that is the
24 holding of Munsingwear, Your Honor.

25 JUSTICE SOUTER: But in -- in any case,

1 Munsingwear turned on -- not on the availability of --
2 of an appeal generally, but on the mootness of the
3 case. In other words, Munsingwear said, look, your
4 case disappeared, and the -- the only way to get rid of
5 the order you don't like is -- is vacatur. And if you
6 didn't take that opportunity to get rid of it, then the
7 -- the decision that was made survives, and that gets
8 preclusive effect. It -- it doesn't -- Munsingwear
9 would not apply of its own force in this case.

10 MR. PERRY: Well, Munsingwear reaffirmed
11 Johnson v. Wharton which said that where Congress takes
12 away the right to appeal, there is still collateral
13 estoppel effect of the district court judgment. That
14 -- that was the previous decision that Munsingwear
15 affirmed.

16 JUSTICE GINSBURG: But not if the litigant
17 asks to have it vacated under Munsingwear, the litigant
18 would be entitled to have it vacated. So it was a foot
19 fault and the -- the Court held the counsel to the
20 mistake that had been made.

21 MR. PERRY: Your Honor, the -- the holding of
22 Munsingwear is that Johnson v. Wharton is good law, and
23 a court need not give -- may give preclusive effect to
24 a case without an appeal.

25 CHIEF JUSTICE ROBERTS: Counsel --

1 MR. PERRY: If the Court would like to change
2 that law, it's -- it's up to this Court, but that's how
3 we come to this case.

4 CHIEF JUSTICE ROBERTS: Counsel, if you -- on
5 the removal question, if there's a dispute about
6 whether it's a covered class action, dispute about the
7 number of people involved, the dollar amount, I take it
8 that is litigated at the jurisdictional stage?

9 MR. PERRY: Correct, Your Honor. I think --

10 CHIEF JUSTICE ROBERTS: Okay. But you say
11 that when it gets to whether it's a -- there's a --
12 involving a covered security, for some reason that
13 can't be litigated at the jurisdictional stage.

14 MR. PERRY: No, Your Honor. That is the
15 merits determination. And -- and the statute tracks --

16 CHIEF JUSTICE ROBERTS: I'm sorry. No or
17 yes? That that is not litigated at the jurisdictional
18 stage?

19 MR. PERRY: That the preclusive elements are
20 the merits question of the case, not the jurisdictional
21 question.

22 CHIEF JUSTICE ROBERTS: Why is that? There
23 -- it's the same clause. What you can remove is a
24 covered class action involving a covered security. So
25 why do we have such different approaches to the

1 different prongs?

2 MR. PERRY: Your Honor, I'm agreeing with you
3 on covered security. I'm -- I'm saying that there then
4 is the further inquiry of whether all of the preclusive
5 elements of subsection 77p(b) are met, which is the
6 merits inquiry.

7 CHIEF JUSTICE ROBERTS: Right. And --

8 MR. PERRY: There -- there are very few cases
9 that don't involve covered securities because virtually
10 every security is covered. There are very few cases
11 that aren't covered class actions because if they
12 involve more than 50 people, that's about all the
13 requirement there is. Those are the jurisdictional
14 prerequisites. That, if established, gives the court
15 subject-matter jurisdiction.

16 Then we have the substantive elements of the
17 SLUSA preclusion defense provided in a different
18 statute that is not jurisdictional, just like this
19 Court described in Arbaugh. The covered security and
20 covered class action Congress made jurisdictional by
21 putting them in the statute. The substantive elements
22 of the defense Congress did not make jurisdictional
23 because they're in another statute.

24 That's the disconnect that Judge Easterbrook
25 understood so that on the face of the opinion of the

1 district court, where it recites the defendants
2 maintain that the in-connection-with requirement was
3 met, that defense, if colorable -- and it clearly was.

4 This Court has accepted it in Dabit -- conferred
5 jurisdiction on the court, and then the substantive
6 decision on the merits was the merits determination.
7 That is the decoupling that Congress did in SLUSA, that
8 Judge Easterbrook correctly recognized, and that puts
9 this case squarely within the Thermtron exception to
10 1447(d).

11 JUSTICE GINSBURG: How do you answer the
12 argument, the third argument, that Mr. Frederick
13 stressed that is, that Congress provided specifically
14 in the Class Action Fairness Act, a couple of other
15 acts, and 1447 itself with respect to civil rights
16 actions removable under 1443? In all those cases, it
17 provided specifically for review of remand decisions,
18 and here the silence is deafening.

19 MR. PERRY: In those cases, Your Honor, they
20 work differently than SLUSA for two reasons. One,
21 they're the whether -- not whether it will be tried,
22 but where it will be tried. And when Congress -- and
23 when it was only a where question, Congress puts in a
24 specific provision.

25 The other is CAFA, for example, is expressly

1 jurisdictional. It amends the diversity statute. So
2 there's no argument that it would be within Thermtron.

3 Every CAFA question is a 1447(c) issue. Congress had
4 to make it.

5 Here, Congress knew about Thermtron.
6 Congress has known about Thermtron for 30 years. This
7 Court reaffirmed Thermtron while they were debating
8 SLUSA. And Congress knew that this question was not
9 jurisdictional. Congress decoupled them, just as this
10 Court described in Arbaugh.

11 JUSTICE GINSBURG: I don't know what -- what
12 Congress' knowledge about. Thermtron was a district
13 judge who said, they removed this case, but I'm much
14 too busy. This court is much too busy to mess with
15 stuff that belongs in the State court. I'm remanding
16 it. That was just too much, and the Federal court --

17 MR. PERRY: And, Justice Ginsburg, if Judge
18 Hermansdorfer had said, I'm much too busy and therefore
19 I lack subject-matter jurisdiction, it is inconceivable
20 that the Thermtron case would have been decided any
21 differently. Congress understands the difference
22 between jurisdiction and merits. This Court
23 understands the difference between jurisdiction and
24 merits. Judge Easterbrook certainly understood that
25 distinction. This determination made by the district

1 court here was a merits determination not controlled by
2 1447(c), and therefore, appeal was not barred by
3 1447(d).

4 CHIEF JUSTICE ROBERTS: But -- but I still
5 don't -- and this gets back to the question I asked
6 before. I mean, subsection (c) of 77p -- it's
7 unfortunate we've got a lot of subsection (c)'s here
8 but -- of -- of SLUSA incorporates subsection (b).

9 MR. PERRY: No, Your Honor. It references
10 subsection (b).

11 CHIEF JUSTICE ROBERTS: Well, it says what
12 can be removed is the covered class action involving a
13 covered security, as set forth in subsection (b).

14 MR. PERRY: Just as title VII says what can
15 be brought is an action under this title or just as the
16 environmental statute in Steel Company said what can be
17 brought is an action under subsection (a).

18 The cross reference of another provision
19 containing substantive elements of Federal law does not
20 make those elements jurisdictional. That's the holding
21 of Arbaugh. That's the holding of Steel Company.
22 There's no reason that the same principle shouldn't be
23 applied when Congress makes a Federal defense removable
24 as when it makes a Federal claim subject to suit within
25 the original jurisdiction of the Federal courts.

1 JUSTICE SOUTER: But -- but here, what is set
2 out in subsection (b) is exactly the reason for
3 Congress' wanting to place these restrictions on it,
4 and that, it seems to me, is the sensible reason for
5 reading it the way your -- your brother on the other
6 side does.

7 MR. PERRY: Well, Justice Souter, we know
8 from Mesa that if Congress had just made all covered
9 class actions removable, we would have to find some
10 Federal defense to support Article III jurisdiction.
11 Congress, by cross-referencing subsection (b), just
12 pointed the Federal courts to the particular Federal
13 defense that is sufficient, clearly sufficient, to make
14 Article III satisfied under the Mesa case. That's all
15 that that cross reference is doing.

16 It's not, however, picking up every element.
17 If Congress wanted to include every element of title
18 VII, that environmental statute of SLUSA, it would have
19 put them in the jurisdictional provision. Arbaugh says
20 --

21 CHIEF JUSTICE ROBERTS: Why would it have
22 done that? That would have been a waste of time. I
23 mean, you just say, as set forth in subsection (b).
24 You're saying if they had repeated subsection (b)
25 there, we'd have -- the case would come out the other

1 way?

2 MR. PERRY: Yes, Your Honor. We have not
3 only the -- the reference there, but we have the final
4 sentence of that clause where we say after removal,
5 after the court establishes that it has removal
6 jurisdiction, it shall subject the action to subsection
7 (b). That clause is entirely redundant under
8 petitioners' reading of the statute. Entirely
9 redundant. I've read the reply brief a number of
10 times. I don't understand their explanation for that.

11 The only explanation is that Congress made
12 removability contingent on the subsection (c) factors.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Perry.

15 Mr. Frederick, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT OF DAVID FREDERICK

17 ON BEHALF OF THE PETITIONERS

18 MR. FREDERICK: Thank you. I think it's
19 really important for you to look at the complaints in
20 these cases because every single one of them asserts
21 claims on the basis of negligence and the value -- the
22 fair-value pricing of the securities. They are not
23 based on misrepresentations. The other side has
24 attempted to make them look like misrepresentations,
25 and they've quoted things out of context in order to do

1 so. But the complaints themselves are pure negligence
2 claims that would fall outside of SLUSA.

3 But even if you were to disagree with that
4 and even if you were to disagree with the district
5 court's basis for saying that remand was proper because
6 it lacked subject-matter jurisdiction, the general rule
7 of *Thermtron*, *Things Remembered*, and importantly, the
8 *Gravitt* case applies. And this Court does not have
9 appellate jurisdiction. The Seventh Circuit does not
10 have appellate jurisdiction because of the plain
11 language of section 1447(d).

12 Respondents concede that State courts can
13 decide SLUSA questions. It is up to defendants to
14 decide whether to try to remove them. And subsection
15 (d), about which Mr. Perry spoke, expressly provides
16 that certain kinds of securities actions shall be
17 remanded because Congress was not so concerned that
18 Federal courts decide everything concerning securities
19 cases, but only as to those that are expressly set
20 forth in subsection (b).

21 And, Mr. Chief Justice, respectfully, what
22 subsection (c) is doing with its references to
23 subsection (b) are to incorporate those criteria as one
24 of the three elements or criteria for removability. It
25 has to be a covered security, has to be a covered class

1 action, and it has to meet the requisites of subsection
2 (b). That's the only reasonable way to read that. And
3 the last clause is simply confirmatory that if those
4 are -- are met, then the district court has to find
5 that the case shall be precluded.

6 In the Gravitt case, in which this Court
7 through a per curiam dismissed the appeal, there was a
8 dispute between the district court and the court of
9 appeals over whether the district court had properly
10 applied subject-matter jurisdiction principles in
11 deciding whether or not there was diversity. This
12 Court said, no matter. That is outside the -- the
13 requisite -- that is outside 1447(d), and the general
14 rule against appealability applies.

15 Now, importantly, they argue that they would
16 be precluded by -- from arguing against SLUSA
17 preemption in State court, but in fact, the last brief
18 -- the last page of our brief, our reply brief, cites
19 the Standefer case in which this Court held, under
20 contemporary principles -- and I'm quoting now -- under
21 contemporary principles of collateral estoppel, the
22 inability to pursue an appeal is a factor strongly
23 militating against giving a judgment preclusive effect.

24 JUSTICE KENNEDY: Do you agree that there
25 would be Federal court review in this Court from a

1 State court determination on the applicability of SLUSA
2 in this case?

3 MR. FREDERICK: Yes, there would be. And
4 there would be -- their argument about the Missouri
5 Pacific case is wrong because what the -- what was
6 going on there was the remand determination, not the
7 underlying Federal right. And that's what would be
8 appealed, and there would also be appeal of the
9 preclusive consequences because that would be a
10 question of Federal law under this Court's longstanding
11 determination. The Restatement --

12 JUSTICE STEVENS: May I ask you one question,
13 Mr. Frederick? Because it's important to me.

14 Would you agree that a complaint that alleged
15 that the defendant negligently used or employed
16 manipulative devices and so forth would be covered by
17 SLUSA -- would preempt it?

18 MR. FREDERICK: That would be covered. And
19 -- and the reason is that it is -- involved a
20 manipulation. The wording of SLUSA involves a
21 manipulation of -- of the security.

22 JUSTICE STEVENS: So the mere fact that it's
23 negligently caused would not preclude preclusion.

24 MR. FREDERICK: What -- what we're talking
25 about here, Justice Stevens -- it's important -- is

1 that in how these securities get priced, was there
2 negligence in the pricing of those, that had
3 deleterious effects on one class of holders but not on
4 market-timers that we were moving in and out of the
5 market.

6 And so, frankly, Judge Easterbrook was wrong
7 for a sixth reason, and that was in saying that there
8 would have been a derivative claim here too because a
9 derivative case has to be brought on behalf of the
10 corporation on behalf of all shareholders --

11 JUSTICE BREYER: Then the district court was
12 wrong too I guess because the district court made the
13 same --

14 MR. FREDERICK: The district court was wrong
15 in not anticipating what this Court held in Dabit, but
16 it was not wrong insofar as it held that there was no
17 subject-matter jurisdiction because this case is based
18 on negligence and not fraud.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr.
21 Frederick.

22 The case is submitted.

23 (Whereupon, at 11:59 a.m., the case in the
24 above-entitled matter was submitted.)

25